IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 3RD DAY OF JUNE 1998

Before

THE HON'BLE MR.JUSTICE HARI NATH TILHARI 3/-98

R.F.A. No.392/1992 c/w. C.R.P.No.354/1993

Between:

Mrs. K.R.Lalitha
w/o.M.C.Shetty, 40 yrs.,
c/o.M.C.Shetty, Credit
and Commerce Insurance
Company (UAE) Limited,
P.B.No.13066, Dubai,
UAE, formerly r/a.No.21,
Ground Floor, Ist Mn. Rd.,
Vyalikaval,
Bangalore-3. .. Common
APPELLANT/PETITIONER
in both RFA & CRP.

(By Sri.G.B.Sastry for
Sri.M.T.Nanaiah, Adv.)

And:

Sri.Subramanya .K.R.
s/o.late K.Rama Rao,
49 yrs., r/o.No.38/106,
'Gurucharan', 11th Mn,
Malleswaram, Bangalore-3. .. Common
RESPONDENT in
both RFA & CRP.

(By Sri.Sathyanarayana, Adv.)

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The R.F.A. No.392/1992 is filed u/s.96 of CPC against the judgment & decree dt.20-4-1992 passed in OS.No.3680/89 on the file of the XIX Addl.City Civil Judge, Bangalore, decreeing the suit for recovery of money.

The C.R.P. No.354/1993 is filed u/s.115 of CPC against the order dt.5-1-1993 passed in Ex. No.706/92 on the file of the XVI Addl.City Civil Judge, Bangalore, directing the D.Jr to furnish a proper security by 15-1-1993.

These R.F.A. & C.R.P. coming on for orders this day, the Court delivered the following:-

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J U D G M E N T

The Civil Revision Petition and Regular First Appeal are connected and the learned counsel for the parties have stated that primarily fate of revision may depend on the fate of the appeal and so both were connected and listed for hearing before this Court and has also been listed to-day with the application for restoration. These have been restored today and counsel called to argue, they open the arguments thereafter. Heard the learned Counsel's for the parties.

2. The facts of the case in nut-shell are that, the plaintiff-respondent who is opposite party in the revision as well had filed a suit for recovery of a sum of Rs.78,250/- on the basis of a promissory note alleged to have been executed on 15-3-1988 coupled with a cheque dated 18-4-1989 subsequently revalidated as per the plaintiff's case. I may make it clear that suit was for Rs.78,250/- (Rs.78,000/- as principal amount and Rs.250/- as legal expenses incurred towards notice etc.). No doubt, parties to the suit are closely related as brother and sister. According to the plaintiff's case, defendant required financial assistance and

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required money for construction of the house and in response to the defendant's request, plaintiff arranged money and lent it to the defendant-appellant on 15-3-1988 to the tune of Rs.78,000/-. According to the plaintiff's case, while borrowing money from the plaintiff, defendant executed an on-demand promissory note and the consideration receipt dt.15.3.1988 agreeing to repay the same to the plaintiff together with interest at the rate of 1.5% per month on the amount. According to the plaintiff's case, defendant has issued a cheque bearing No.0352044 dt.15-1-1989 in favour of the plaintiff for a sum of Rs.78,000/- drawn on Canara Bank, Cantonment Branch, Bangalore, towards the repayment of the principal amount and on being presented by the plaintiff to the Bank for realisation, the same was returned with an endorsement "Refer to Drawer". Plaintiff's case is that on cheque being dishonoured, plaintiff sent a ~~registered~~ The 1st cheque to the defendant by registered post along with a letter dt.3-3-1989 for change of date and authentication. The defendant changed the date of the said cheque as 18-4-1989

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and sent the same to the plaintiff by post along with the covering letter dated 5-4-1989 undertaking to honour the cheque. The plaintiff submits that it was again presented for realisation on 20-4-1989, but the same was bounced and was dishonoured. On the cheque being dishonoured twice, plaintiff sent a legal notice dt.1-6-1989 and called upon the defendant to pay the sum of Rs.78,000/- with interest thereon. But inspite of the repeated requests and demands, the defendant did not pay the same. So the suit was filed.

3. The Power of Attorney holder for the defendant has filed the written statement denying the plaintiff's case and contending that the suit is frivolous, vexatious and not maintainable and theory put up by the plaintiff-respondent was incorrect. It was further stated in the written statement that it is wrong to say that plaintiff lent a sum of Rs.78,000/- on 15-3-1988 and executed an on-demand pronote and consideration receipt agreeing to pay interest at the rate of 1.5% per month on the said amount. It was contended

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that there is no privity of contract between the plaintiff and the defendant. The defendant took a plea that the theory of issue of cheque bearing No.0352044 dated 15-1-1989 and 18-4-1989 and the letter dt. 3-3-1989 alleged to have been issued by the defendant and the memos alleged to have been issued by the Bank and the letter dated 5-4-1989 alleged to have been written by the defendant are all created and got up for the purpose of the case. Defendant denied to have received any notice such as notice dated 1-6-1989 alleged to have been issued by the plaintiff.

4. On the basis of the pleadings of the parties, the trial Court framed the following issues:-

1. Whether the plaintiff proves that the defendant has borrowed a sum of Rs.78,000/- on 15-3-1988 and executed an on-demand promissory note and consideration receipt agreeing to pay interest at the rate of 1.5% per month on the said sum?

2. Whether the plaintiff proves that the defendant issued a cheque on 15-1-1989 for Rs.78,000/- and it was returned?

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3. Whether the plaintiff proves that the date of the cheque was subsequently extended to 18-4-1989?

4. Whether the plaintiff proves that he is entitled for the interest at 1.5% per month on Rs.78,000/-?

5. What decree or order?

5. The trial Court after having considered the evidence of the parties, has relied on the evidence led by the plaintiff and held that the plaintiff has been able to establish the transaction in Ex.P-1 and P.2 and execution of Ex.P.1 and P.2. Plaintiff has able to establish that the defendant had borrowed a sum of Rs.78,000/- from the plaintiff and executed a pronote and the consideration receipt and agreed to pay interest at the rate of 1.5% per month. It further held that along with the evidence led by the P.Ws. that presumption under section 118 of Negotiable Instrument Act which is applicable to the case whereunder the transaction exhibited by Ex.P.1 and P.2 is established to have supported by consideration i.e. a sum of

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Rs.78,000/- given by the plaintiff to the defendant. The trial Court further opined that the transaction was not a business/Commercial transaction. It further held that plaintiff is not entitled to interest on the amount of loan as parties are closely related and transaction between brother and sister is not a commercial one. It further found that from the date of suit the plaintiff is entitled to interest till its realisation when a demand is made through a process of suit and the defendant denied the very execution. The trial Court, as such, decreed the suit for Rs.78,250/- with interest at the rate of 6% p.a.

6. Feeling aggrieved from the judgement and ~~decree~~ decree of the trial Court, defendant filed a Regular First Appeal No.393/1992. In course of appeal, this Court passed an order on 16-9-1992 directing that the appellant shall deposit the costs awarded which the respondent may withdraw. Regarding the other portion of the decree namely the decretal amount, appellant was required to furnish

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proper security before the trial Court. Subject to above conditions, the interim order was granted. The Court also observed the necessity of expediting the hearing and/for hearing of the appeal after a period of four weeks. In pursuance of this interim order, the defendant's case is that he filed the security, but the trial Court considered the security furnished by the defendant-appellant as insufficient and not proper and so rejected and further directed the defendant-judgment debtor to furnish proper security vide order dated 5-1-1993. The defendant filed the Revision Petition under section 115 of C.P.C. from that order dt. 5-1-1993 passed by the learned Civil Judge. When the revision was filed, it was connected with the first appeal.

7. I have heard Sri.G.B.Sastry holding brief for Sri.M.T.Nanaiah, learned counsel for the appellant and Sri.Sathyanarayana, learned counsel for the respondent.

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8. It had been contended by the learned counsel for the parties that the fate of the revision is dependent on the fate of the appeal. So parties impressed upon the court that the appeal may be heard and disposed of once the order is recalled. It has been contended on behalf of the learned counsel for the appellant that the finding regarding transaction of loan that a sum of Rs.78,000/- was given by the plaintiff to the defendant-appellant and the defendant-appellant executed a pro-note and receipt there for is wrong and erroneous as the evidence of P.W.2 is not reliable as P.W.2 could not give the identification of the defendant. He also stated that interest settled was 1.5% p.a. while it was as per pro-note interest settled was @ 1.5% per month. Similar other mistakes have been identified. As such, the evidence of P.W.2 is not reliable.

9. I am unable to accept the contention of the learned counsel for the appellant. The trial Court has considered all these aspects of the matter. It would be appropriate at this

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juncture to quote the following observations:-(para 22)

"In order to show that the 1st defendant executed Ex.P.1 and P.2, the plaintiff has led corroborative piece of evidence through P.W.2, who is a responsible officer of the Bank. Except suggesting to this witness that he is the close friend and an employee of Canara Bank, there is no unnatural to disbelieve the evidence of P.W.2. Mere discrepancy as to the week day in the evidence is not sufficient to say that this witness was not present at all at the time of transaction. Therefore, the contention of the plaintiff is not left without corroboration but the evidence of P.W.1 is corroborated by P.W.2. It is also stated by P.W.2 that he was also present at the time of making payment on Exs.P.1 & P.2 and the payment in cash was received by the defendant. Assuming for a moment that no consideration had been paid; when the signature of the defendant is found in Ex.P.1 and P.2 coupled with the cheque Ex.P.3 which is said to have been revalidated under

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Ex.P.8 along with cover Ex.P8(a), the explanation offered by the P.A. holder about the theft of the cheque being not satisfactorily pleaded and no inmates having been examined about the possession of the cheque book in the premises and the alleged loss of the cheque book from the premises of the defendant at Subramaniyanagara, I feel that the plaintiff was able to establish Ex.P.1 and P.2."

The Trial Court further found that the defendant had failed to rebut the presumption that may arise under section 118 of the Negotiable Instrument Act. As such, it found that the defendant had taken the money and executed a pro-note (Ex.P.1 and P.2) and is liable to pay the said amount. It is one of the well settled principles of law that ordinarily appellate court should bear in mind that where the question is one of which depends of the fact and decision upon appreciation of evidence as it did not have the advantage which the trial court had in having the witnesses before him and observing the manner in which the witness deposes in the Court. as a rule

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of practise where there is a conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Court's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the Appellate Court should not interfere with the finding of fact as laid down by Lord Atkin's in the case of W.C.MACDONALD v. FRED LATIMER, AIR(16) 1929 PC 15 at page 18. The Supreme Court in the case of SARJU PERSHAD v. JWALESHWARI (AIR 1951 Supreme Court 120) had followed the principle laid down in the case of W.C.MACDONALD v. FRED LATIMER (AIR(16)1929 P.C. 15) and in the case of VEERASWAMI v. TALLURINARAYYA (AIR 1949 P.C. 32). The Supreme Court in the above case has observed and laid down that is the duty of appellate Court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the Court outweighs such finding.

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[redacted]. In the present case, in my opinion, no special circumstances has been pointed out by the appellant's counsel which may be said to have escaped the notice of the court with reference to the question of credibility of the plaintiff's witnesses and important circumstance also comes out that the defendant has not dared to come in witness-box to deny her signature. It was the duty of the defendant to come in witness-box and failure of the defendant to appear in witness-box is a further circumstance that goes against the defendant-applicant.

10. Thus considered in my opinion, the finding recorded by the court below on the basis of appreciation of entire evidence on record does not suffer from any error. It appears to be one probable finding which could be arrived at and there is no good ground to interfere with the judgment and decree of the trial Court. Respondent's counsel submitted that interest should be allowed and the trial court was not right when they observed that interest was allowed

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at 1.5% p.m. No appeal or cross-objection has been filed by the plaintiff. Such a contention cannot be permitted to be raised under Order 41 Rule 22 C.P.C.

Thus considered in my opinion, there is no good ground to interfere with the judgment and decree of the trial Court. The appeal being devoid of merits is hereby dismissed with costs. The revision has been filed from the interim order passed by this court on 16-9-1992 requiring the appellant to deposit the costs i.e. decretal cost and to furnish proper securities for the rest of the amount in the decree which according to the defendant ~~was~~ to his best he furnished, but the trial Court considered the securities to be insufficient and not proper and rejected those securities and directed to furnish proper securities. It is from this order, the revision has been preferred. The revision really becomes infructuous as interim order has to go out with the disposal of appeal. There would be no good ground to allow the revision on any ground even if there ~~is~~ would have been merit, because interim order

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automatically also stands vacated. Hence, revision also got to be dismissed.

Thus considered, both the Regular First Appeal as well as Civil Revision Petition are hereby dismissed on merits as being without substance and merits. Appeal has been dismissed with costs.

Sd/-
JUDGE

bss/-